

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION**

AVKO Educational Research Foundation, Inc.,
and Donald J McCabe, author,

Plaintiffs and Counter-Defendants ,

V

Thomas A. Morrow; Wave 3 Learning, Inc;
Home School Holdings, Inc; Home School,
Inc;

Defendants and Counter-Plaintiffs.

Case no: 1:11-CV-13381-TLL-CEB

Hon. Thomas L. Ludington

Mag. Charles E. Binder

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PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STRIKE EXHIBITS (D30)
REFERENCED IN PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (D12)
AND SUPPORTING BRIEF

Plaintiff responds to Defendants' Motion to Strike Exhibits (D30) referenced in
Plaintiffs Motion for Preliminary Injunction (Doc 12) and states:

1. Admitted.
2. Admitted

3. Denied. Plaintiffs will rely on the Judge's discretion, during hearing, under rule 104(a) as these objections are primarily for Trial before a Jury.
4. Denied. See #3 above.
5. Denied. See #3 above.
6. Acknowledged.
7. Fed. R. Civ. Proc. 12)f) permits the court to strike is inapplicable. Since there is no issue regarding granting a TRO based on the pleadings, the Court having set a date for a full hearing, the issues set forth in this motion are moot. The Motion should be stricken as irrelevant and frivolous.
8. Plaintiffs demand costs for having to respond to a moot, irrelevant, and frivolous motion.

Respectfully submitted,

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**PLAINTIFFS' SUPPORTING BRIEF FOR THEIR RESPONSE TO DEFENDANTS'
MOTION TO STRIKE EXHIBITS (D30) REFERENCED IN PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION (D12)**
CERTIFICATE OF SERVICE

Fed. R. Civ. Proc. 12(f) provides the court may strike from a pleading and matter
that is:

1. An insufficient defense
2. Redundant

3. Immaterial
4. Impertinent
5. Or scandalous.

The complaints of Defendants regarding the declarations are factual and opinion matters subject to the rules of evidence at a trial, a hearing on the merits, or a motion, such as a Fed. R. Civ. Proc. Rule 12(b)(6), Rule 56, or similar, where the Court will rule based on only the pleadings and affidavits. Fed. R. Civ. Proc. Rule 12(f) does not permit striking hearsay, legal conclusions, statements outside personal knowledge, or opinions based on irrational perceptions unless they are an insufficient defense, redundant, immaterial, impertinent, or scandalous. Here, the declarations are meant to provide the court with the basis to either grant an *ex parte* TRO or hold a full hearing on the merits to decide whether or not to issue a preliminary injunction to be in place only during the litigation. In the status conferences the Court informed counsel that a hearing on the merits would be scheduled, implicitly refraining from the grant of a TRO. Thus, the issue of a grant of relief based solely on pleading is moot. Being moot, Defendants bringing a motion based on a moot issue make the Motion irrelevant and frivolous, suitable for striking under Fed. R. Civ. Proc. 12(f).

In *Cleveland Financial Assoc.s v. Banquets*, 2011 Ohio 931 (Ohio App., 2011) the merits of the trial courts final judgment became moot while appellant's appeal was pending. Appellant Banquets had lost a forcible entry and detainer action and was ordered to vacate the premises. They appealed. During the appeal process, multiple procedural actions ensued; but the issues became moot because the appellant vacated the premises, thus the relief which they sought, could not be granted. Also, appellant had failed to file a necessary bond required by to continue a stay further making the appeal unperfected. The court dismissed the appeal stating

that there was no important question nor public interest that would require a decision on a moot issue - and taxed costs against appellant.

The relief Defendants requests is based on a moot issue and are now valid only in a hearing on the merits.

WHEREFORE Plaintiffs request the Court to strike Defendants Motion to strike and assess costs and attorney's fees for having to respond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Susan Payne Woodrow certifies that she served the below interested parties by electronic filing with the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record set forth below:

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